Hon. Judge Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CHINTAN MEHTA, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF STATE, et al., Defendants.	Case No. 2:15-cv-1543-RSM PLAINTIFFS' RESPONSE IN OPPOSITION TO MOTION TO DISMISS SECOND AMENDED COMPLAINT

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I. INTRODUCTION

This is a case about whether the government can act, expect reliance, then groundlessly change its mind. The Defendants contend that they have no obligation to Plaintiffs and have moved to dismiss Plaintiffs' complaint for lack of jurisdiction and failure to state a claim.

The jurisdictional challenge contends that a Visa Bulletin does not involve legally enforceable rights, is not final, and is based on limitless discretion. That is not so. Courts commonly enforce the dates in the Visa Bulletin and once a Visa Bulletin is issued, Defendants take no further action to make it official. It is final on the day it is issued. Additionally, Defendants' actions are governed more strictly than they claim. The limitless discretion they request is rare, and nothing in the laws implies that Congress intended to give them such discretion. Therefore, this challenge fails.

As to Defendants challenges to the merits of the claims, Defendants' arguments are unavailing. The Second Amended Complaint ("Complaint") carefully lays out the facts showing Defendants conduct establishing liability. The determinations on visa availability were improper and the Defendants exercised excessive authority and acted contrary to law. The Plaintiffs' facts show that Defendants actions violated the APA. The facts further show that Defendants owed Plaintiffs due process for revising the Visa Bulletin and causing them harm. Defendants offered no process and no explanation for their actions.

While Defendants make a number of arguments employing a variety of sometimes inconsistent theories, there is one overarching and recurring theme: DOS and USCIS contend that they can take whatever action they desire in declaring visa availability, at any time, with no consideration for the harm they cause, with no notice or explanation or proof of the necessity of the change. According to DOS and USCIS, no court has jurisdiction to review its actions, and the Plaintiffs do not have any interest in those actions. As set forth below, the governing statutes, the

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regulations, and the law do not support Defendants' assertion of such supreme and far-reaching unreviewable power. The motion to dismiss should be denied.

II. SUMMARY OF FACTS

Since the original INA became law in 1952 over President Truman's veto, the Department of State ("DOS") has been responsible for calculating and projecting visa availability and publishing its official determinations. ECF No. 22-1, ¶¶42-47. The Visa Bulletin is DOS's official publication governing visa availability. *Id.* at ¶52. The U.S. Citizenship and Immigration Service ("USCIS") is responsible for accepting and reviewing Adjustment of Status applications ("adjustment applications"), the approval of which grants the applicant Legal Permanent Residence ("LPR"), colloquially known as a Green Card. USCIS must accept adjustment applications for which a visa number is "immediately available," which in turn is determined by the visa availability information published by DOS in the Visa Bulletin.

Visas are divided primarily into two types: family visas and employment visas. Within each types are different categories. Each category within each type is subject to its own cap on the number of visas available in a given year. When an individual begins the visa process, he or she is given a "priority date." ECF 22-1, ¶51. Those priority dates determine where the applicant falls in the line within his or her given category. *Id.* For Indian and Chinese nationals applying for employment-based green cards such as the plaintiffs, the waitlist is usually long. They usually come to the U.S. on a temporary employment visa while waiting for their green card.

While in the U.S. on temporary employment visas, these individuals have an extremely difficult time changing jobs (even within the same company), getting a raise, being transferred to a different work site, and visiting home. *Id.* at ¶¶15-28. As a result, they are often paid tens of thousands of dollars less than co-workers with comparable education and experience, who also get promoted ahead of them, while the applicants are stuck until they can apply for a green card. *Id*. For this reason, applicants wait anxiously for the release of the monthly Visa Bulletin. *Id*.

When an applicant's priority date falls before the Visa Bulletin cutoff date governing filing, that applicant commonly rushes to complete all of the steps and submit the application as early as possible. ECF No. 22-1, ¶57. This allows the applicant to breathe easier for the first time in years because the process will give them freedom in their personal and professional lives that has been missing for years. The applicant is no longer trapped by the immigration system.

This dramatic change results both from the forthcoming green card, which finally admits the applicant as part of the U.S. community, and the benefits immediately available upon the submission of the application. Their children and spouse also get freedom not previously available, as they are not permitted work on their derivative visa from a temporary employment visa. ECF No. 22-1, ¶¶16, 28. While USCIS processed the application, applicants are eligible to apply for an Employment Authorization Document ("EAD"), which grants the applicant employment freedom, and Advance Parole for travel, which allows the applicant to travel out of the U.S. and return without getting specific approval beforehand. These benefits may seem minimal, but for an Indian college graduate with a Master's degree, seven years stuck at the exact same job, and few if any visits home to see family, these benefits can be life-changing. It is hard to explain the impact of the end of servitude on an indentured servant. It is safe to say, though, that the servant who willingly put themselves in that position did so with their eyes toward the freedom and opportunity at the end of the road. As a result of these benefits, the monthly Visa Bulletin is an incredibly impactful publication. *See* ECF No.22-1, ¶¶15-28.

Starting in 2014, the Obama Administration began working on modernizing the visa process. ECF No. 22-4. One aspect of that was to try to reduce the number of unused employment visas each year, as there are plenty of people waiting in line to obtain them, the process has simply moved too slowly. ECF No.22-1, ¶¶68-77. USCIS and DOS met dozens of times in 2015 to work on modernizing the visa process, including adding more information to the Visa Bulletin. ECF No.22-1, ¶74. It was decided to add a Dates for Filing chart to the Visa Bulletin starting in Fiscal Year 2016, which began in October 2015.

The original October 2015 Visa Bulletin ("Original Visa Bulletin") published by DOS on September 9, 2015 brought great joy to thousands of visa applicants. ECF No. 22-3. It included a Dates for Filing chart listing cutoffs dates for each category. *Id*. These cutoff dates granted applicants with a Priority Date before the cutoff the right to submit an adjustment application on October 1, 2015. ECF No. 22-3. Some Priority Date–visa category combinations were able to apply for adjustment for the first time. ECF No.22-1, ¶¶90-96. The Visa Bulletin also stated that USCIS would make the final determination about visa availability for adjustment of status. ECF No. 22-3. This was made even clearer with subsequent bulletins. *See* http://www.travel.state.gov/content/visas/en/law-and-policy/bulletin.html (last visited Mar. 8, 2016).

Many of the newly-eligible applicants spent thousands of dollars getting together the necessary documents, going to the USCIS-approved doctors, getting legal help, and more. ECF No.22-1, ¶¶90-96. They also made major life decisions such as to terminate pregnancies on account of the risks associated with the required vaccinations and to cancel trips home because it is important that applicants with pending adjustment applications to be available to interview at a moment's notice. ECF No.22-1, ¶¶93-96. For 16 days, these individuals were excited about the opportunity ahead and exhausted from trying to complete their application packet while working.

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When DOS and USCIS announced on September 25, 2015 that the Original Visa Bulletin was no longer going to be used, many applicants were absolutely crushed. ECF No. 22-7. DOS issued a revised October 2015 Visa Bulletin ("Revised Visa Bulletin"), moving back—"retrogressing"—the dates for filing for six categories, including China Employment-Based Second Preference and India Employment-Based Second Preference. *Id.* For thousands of applicants, a substantial amount of money spent was simply wasted. ECF No.22-1, ¶116. This was a particularly difficult financial harm for these individuals given that they were already earning often tens of thousands less than they would be earning with employment flexibility. The Revised Visa Bulletin did not even give these applicants a good explanation for why this harm was required, stating simply that the revised dates for filing were better. ECF No. 22-7 at 2.

III. ARGUMENT

A. Legal Standard

Defendants base their motion to dismiss on lack of jurisdiction and failure to state a claim. Fed. Rule Civ. P. 12(b)(1), (6). In ruling on a facial Rule 12(b)(1) motion, a court must accept the complaint's factual allegations as true and construe them in the light most favorable to the plaintiffs. *Carson Harbor Village, Ltd. v. City of Carson*, 353 F.3d 824, 826 (9th Cir. 2004).

A complaint should not be dismissed under Federal Rule of Civil Procedure 12(b)(6) if "it may be supported by showing any set of facts consistent with the allegations in the complaint." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 563 (2007). In reviewing the motion, a court takes as true all allegations of material fact in the complaint and construes them in the light most favorable to the plaintiff. *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009). A complaint is plausibly alleged and cannot be dismissed even if it appears "that a recovery is very remote and unlikely." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). "Plausibility" does not relate to the likelihood that the plaintiff will prove the allegations, but whether the allegations

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"allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Champlaie v. BAC Home Loans Servicing, LP*, 706 F. Supp. 2d 1029, 1037-38 (E.D. Cal. 2009) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009)). Assessing the sufficiency of the pleadings on a motion to dismiss, a court must merely ensure that plaintiffs have "nudged their claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570.

In general, in ruling on a motion to dismiss, a court is limited to the four corners of the complaint, except that a court may consider documents mentioned in the complaint, judicially noticeable facts, and undisputed parts of public records. *Anderson v. Holder*, 673 F.3d 1089, 1094 n.1 (9th Cir. 2012); *Daniels-Hall v. Nat'l Educ.Ass'n*, 629 F.3d 992, 998-99 (9th Cir. 2010).

B. This Court Has Jurisdiction to Review Plaintiffs' APA Visa Availability Claims

The APA provides judicial review of "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court." 5 U.S.C. §704. There is a strong presumption of reviewability. *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1967); 5 U.S.C. §702. "A federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging." *Sprint Communications, Inc. v. Jacobs*, 134 S. Ct. 584, 591 (2013) (internal quotation marks omitted). Defendants' jurisdictional challenge fails because this case involves reviewable final agency action.

i. Plaintiffs' APA claims challenge agency final action.

For an agency action to be considered "final" under the APA, two conditions must be satisfied: "First, the action must mark the consummation of the agency's decisionmaking process . . . And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). Finality is a broad, inclusive legal concept that is interpreted in a flexible and pragmatic manner. *Oregon Nat. Desert Ass'n v. United States Forest Serv.*, 465 F.3d 977, 982 (9th Cir. 2006). In

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analyzing finality, courts have considered many factors, including whether the agency action is "a definitive statement of an agency's position," whether the action has a "direct and immediate effect on the day-to-day business of the complaining parties," whether the action has the status of law, and whether immediate compliance is expected. *Mount Adams Veneer Co. v. United States*, 896 F.2d 339, 343 (9th Cir. 1990). At base, "[t]he core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." *Oregon Nat. Desert Ass'n,* 465 F.3d at 982. The Visa Bulletin represents a final agency action.

The issuance of the Visa Bulletin marks the consummation of the decision-making process. The Visa Bulletin is the definitive, binding statement of DOS and USCIS's position and legal and statutory rights flow from it. Once it is issued, DOS and USCIS take no further action to put it into effect. It is not "tentative or interlocutory." Though newly eligible applicants cannot apply until the first of the month, the Visa Bulletin has "extremely important consequences with respect to the issue of good faith reliance for future act." *Gen. Elec.*, 290 F.3d at 383.

Courts and DOS and USCIS themselves consider the Visa Bulletin determinate of an individual's right to apply for adjustment of status. Federal Courts of Appeals and the Board of Immigration Appeals have repeatedly applied the Visa Bulletin as a legally binding statement of visa availability which governs the legal rights of applicants. *See, e.g., De Osorio v. Mayorkas*, 656 F.3d 954, 957 (9th Cir. Cal. 2011); *In re Zamora-Molina*, 25 I. & N. Dec. 606, 609 (B.I.A. 2011); *Bolvito v. Mukasey*, 527 F.3d 428, 431–32 (5th Cir. 2008). The USCIS Adjudicator's Field Manual ("AFM") also established the Visa Bulletin as legally binding, stating multiple times that USCIS shall follow DOS's determinations regarding the availability of visa numbers. AFM 20.1, 21.2, 23.5 (2015). Proposed and final rules published in the Federal Register confirm

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the binding nature of the Visa Bulletin. 72 FR 41888, Temporary Adjustment of the Immigration and Naturalization Benefit Application and Petition Fee Schedule for Certain Adjustment of Status and Related Applications, final rule (Aug. 1, 2007); 80 FR 81900, 81906, Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting High-Skilled Nonimmigrant Workers, proposed rule (Dec. 31, 2015).

An agency action may be a final action under the APA despite the fact that the agency could change its position later. *Am. Petroleum Inst. v. Envtl. Prot. Agency*, 906 F.2d 729, 739-40 (D.C. Cir. 1990); *see also Fox TV Stations, Inc. v. FCC*, 280 F.3d 1027, 1037 (D.C. Cir. 2002) (*Fox TV D.C. Cir.*). An agency that has taken a final action is nonetheless permitted to continue to engage in policymaking on that same issue. *Am. Petroleum Inst*. at 739-40. "[T]he possibility of future agency action is not sufficient to foreclose review of a definitive action. Otherwise, 'review could be deferred indefinitely.'" *Id.*; *see also Fox TV D.C. Cir*., 280 F.3d at 1037–38 (rejecting the FCC's contention that its action was "not final because the agency intends to continue considering the ownership rules"). Moreover, '[f]inality resulting from the practical effect of an ostensibly non-binding agency proclamation is a concept [courts] have recognized in the past." *Nat'l Ass'n of Home Builders v. Norton*, 415 F.3d 8, 15 (D.C. Cir. 2005). Additionally, agency action such as abandonment of a draft policy or a proposed rule change represent the consummation of a decisionmaking process. *Her Majesty the Queen ex rel. Ontario v. Envtl. Prot. Agency*, 912 F.2d 1525, 1531 (D.C. Cir. 1990); *Fox TV D.C. Cir.*, 280 F.3d at 1045; *Am. Petroleum,* 906 F.2d at 739-40. Thus the issuance of a revision contradicting the Original Visa Bulletin is itself a final action and the fact that a revision is possible though unlikely does not foreclose finality.

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Defendants take the position that neither the publication of a Visa Bulletin nor the issuance of a revised Visa Bulletin are final because USCIS makes the final determination. However, pursuant to its own regulations, USCIS has no authority to determine immediate availability and must follow DOS's determinations. 8 C.F.R. §42.51. Additionally, Defendants approach finality in a rigid sense inconsistent with the broad and flexible approach required.

Defendants' actions are final for the purposes of the APA and therefore reviewable.

ii. The dates in the Visa Bulletin are reviewable under the APA

The APA establishes that agency action for which there is no adequate remedy outside of court is reviewable, save two exceptions: where "(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. §701. The law and regulations do not support Defendants' contention that the actions were under DOS and/or USCIS discretion.

Absent a statute precluding review, the government "bears the heavy burden of overcoming the strong presumption that Congress did not mean to prohibit all judicial review of his decision." *Dunlop*, 421 U.S. at 567. This "strong presumption of reviewability . . . can be rebutted only by a clear showing that judicial review would be inappropriate." *Defenders of Wildlife v. Tuggle*, 607 F. Supp. 2d 1095, 1098 (D. Ariz. 2009) (quoting *Nat'l Res. Defense Council, Inc. v. Sec. & Exch. Comm'n*, 606 F.2d 1031, 1043 (D.C. Cir. 1979)("*NRDC*")). Moreover, "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967). Defendants have failed to carry this heavy burden. The Visa Bulletin is a reviewable rule under the APA as it is an "agency statement" of "general . . .applicability and future effect" which is designed to implement and interpret the laws governing visas and their related regulations. 5 U.S.C. §551(4).

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The Supreme Court has repeatedly rejected government arguments that an indeterminate term or phrase grants an agency near-limitless unreviewable discretion. *See*, *e.g.*, *Sackett v. EPA*, 132 S. Ct. 1367, 1373 (U.S. 2012). For example, as discussed by Justice Ginsburg in her concurrence in *Sackett*, the Supreme Count twice rejected the argument of government agencies that vague language in the Clean Water Act providing that it covers "the waters of the United States" and Congress's failure to define that phrase was meant as an "essentially limitless grant of authority." 132 S. Ct. at 1375 (Ginsburg, J. concurring) (citing *Rapanos v. United States*, 547 U.S. 715, 732-739 (2006) (plurality opinion); *Solid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. 159, 167-174 (2001), as the examples).

Defendants claim that the word "reasonable" in the statute stating that DOS is to make "reasonable estimates of the anticipated numbers of visas to be issued during any quarter of any fiscal year" represents a broad, unreviewable grant of discretion. 8 U.S.C. §1153(g). Such discretion is rare and applies to broad declarations more like mission statements. *See Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 66-67 (2004). In *Norton*, the Supreme Court provided examples of a broad mandate, including a mandate to "manage the [Steens Mountain] Cooperative Management and Protection Area for the benefit of present and future generations." 542 U.S. at 66–67. Consider also *American Postal Workers*, where the D.C. Circuit reviewed an agency's construction of the term "average pay," notwithstanding the fact that its interpretation was exempt from notice and comment. 707 F.2d at 559. In that case, the court undertook precisely the type of review Plaintiffs have requested: review of an agency action "to determine its consistency with the governing statute and regulations." *Id.*

Defendants' actions are reviewable. The claims here are based upon laws and regulations which govern specific agency action. Moreover, courts constantly review conduct to determine

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whether it is reasonable. Congress knows how to grant limitless discretion, and this is not it. The statutory language does not represent a limitless grant of unreviewable authority. *Sackett*, 132 S. Ct. 1367. Therefore, the agency actions at issue in this case are reviewable.

C. The Complaint's Allegations Are Plausible Based on the Pleaded Facts

i. DOS's Explanation Is Inadequate

The Defendants have provided a variety of explanations for the revision; the most reasonable under the law was that the dates were based on a miscalculation. None of them are sufficient under the APA.

A reviewing court will "set aside agency action under the Administrative Procedure Act because of failure to adduce empirical data that can readily be obtained." *Fox TV U.S.S.C.*, 556 U.S. at 519 (Kennedy, J, concurring) (citing *State Farm*, 463 U.S., at 46-56). In fact, an action may be reviewed, and set aside as arbitrary and capricious, precisely because the agency has failed "to give a reasoned account of its decision." *Fox TV D.C. Cir.*, 280 F.3d at 1045. This is especially true where the agency claims that a change is needed based on new information. In *Perez v. Mortg. Bankers Association*, the Supreme Court reiterated and underscored its holding in *Fox Television Stations* that "the APA requires an agency to provide more substantial justification when 'its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account. It would be arbitrary and capricious to ignore such matters.'"135 S. Ct. 1199, 1205 (2015).("*MBA*") (quoting 556 U.S. at 515 (citation omitted).

At the time of the issuance of the Revised Visa Bulletin, Defendants' only relevant statement was in the Revised Visa Bulletin stating that "the Dates for Filing Applications for some categories in the Family-Sponsored and Employment-Based preferences have been adjusted to better reflect a timeframe justifying immediate action in the application process."

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ECF No. 22-7. This statement does not explain that the revision was necessary because some of the original Dates for Filing "did not accurately reflect visa number availability," as Defendants claim. It simply states that the revised Dates for Filing were "better."

Defendants note that courts should uphold a "decision [of] less than ideal clarity . . . if the agency's path may reasonably be discerned." *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 497 (2004). But Defendants' path cannot be reasonably discerned. Defendants only stated their conclusion that some of the original Dates for Filing would be "better" if revised, and later alleged a miscalculation. They ask the Court and the public to tie the starting point end ending point together with no thread. Moreover, an agency's vague explanation of an action otherwise unsupported by any evidence is insufficient to justify that action. *State Farm*, 463 U.S. at 46–56. A court will "set aside agency action under the Administrative Procedure Act because of failure to adduce empirical data that can readily be obtained." *Fox TV U.S.S.C.*, 556 U.S. at 519 (Kennedy, J, concurring). DOS and USCIS possess the requisite information but have produced no evidence of this alleged miscalculation, not even in broad terms.

Defendants were required to give more explanation than vague, conclusory statements that the decision was based upon the legal requirements. The Complaint pleaded sufficient facts to show that Defendants have the information explaining their decisions and the relevant data. They have failed to fulfill the obligation to substantiate their action.

ii. Plaintiffs have pleaded sufficient facts to support the subdelegation claim

First, Defendants have taken the position, both publicly with regard to the Visa Bulletin and in their Motion to Dismiss, that USCIS has final authority to determine what visa numbers are available. The Original Visa Bulletin stated that "This bulletin may indicate the ability for [potential adjustment applicants] to . . . use the 'Dates for Filing Visa Applications' charts, when USCIS determines that there are more visas available for the fiscal year than there are known applicants for such visas." The Original Visa Bulletin later reiterates this power. The Revised Visa Bulletin included both of these statements as well. The governing statutes and regulations explicitly give DOS the responsibility of determining visa availability. *See, e.g.* 8 U.S.C. §1153(g); 22 C.F.R. §42.51. DOS's attempt to delegate its responsibility to USCIS is in contravention of these laws and regulations. Therefore, this claim was plausibly plead.

Second, USCIS has claimed this authority to make final visa availability determinations. But USCIS's regulations establish that it has no authority to determine immediate availability, and rather that DOS's Visa Bulletin makes that determination, 22 C.F.R. §42.51, and courts have considered DOS's Visa Bulletin binding on USCIS. USCIS's usurpation of DOS's responsibility exceeded its authority and was contrary to law. 5 U.S.C. §706(2)(A), (C).

Lastly, USCIS used this newly usurped authority to determine visa availability separate from DOS to force DOS to rescind the Original Visa Bulletin and issue the Revised Visa Bulletin. In doing so, USCIS exceeded its authority. 5 U.S.C. §706(2)(D). In caving to USCIS, DOS improperly sub-delegated its own authority. 5 U.S.C. §706(2)(C).

iii. Plaintiffs Have Pleaded Sufficient Facts To Plausibly Allege Defendants' Publications of Visa Availability and Application of "immediately available" violated the APA

An individual can only be eligible to file an employment-based adjustment application "if an immigrant visa is immediately available," 8 U.S.C. §1255, which, pursuant to USCIS regulations, is based on the DOS visa calculations in the Visa Bulletin. 8 C.F.R. 245.1(g)(1). DOS is responsible for administering the provisions of the INA related to visa number availability, 8 U.S.C. §1153(g), and allocates visa numbers based on information from its employees, the waitlist, and DHS officers. 22 C.F.R. §42.51. The APA establishes that agency action contrary to law, arbitrary and capricious, or an abuse of discretion is impermissible. Under arbitrary and capricious review pursuant to the APA, the agency must have "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action." *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co*., 463 U.S. 29, 43 (1983); *see also FCC v. Fox TV Stations, Inc*., 556 U.S. 502, 513-514 (2009) (*Fox TV U.S.S.C.*).

a) DOS failed to base the revised Dates for Filing in the Revised Visa Bulletin on the information and factors required by law

"Agencies must follow a logical and rational decisionmaking process." *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359, 374 (1998) (internal quotation marks omitted). Where an agency improperly weighs evidence or considers impermissible factors, it has abused its discretion. *See id*. Here, only DOS has discretion to determine visa availability, and it must make its decision based on the data available to it. The Complaint alleges that DOS's decision to revise the Visa Bulletin was made based on impermissible grounds. DOS issued the revision, in part, because USCIS demanded that a change be made and because of political pressure. The inconsistent public statements by DOS and USCIS, the lack of substantive explanation, and poor accuracy of the revised dates further substantiate the inference that the revised Dates for Filing were based, at least in part, of something other than estimations of visa availability.

Shortly after DOS released the Original Visa Bulletin, USCIS demanded that some of the Dates for Filing be revised based on its own internal priorities and concerns about the workload that would result from original Dates for Filing. This demand was not based on data or a DOS mistake. Though DOS consults with USCIS on visas, DOS makes the final estimations: "USCIS has no control over the Department of State's allocation of visa numbers, nor over the yearly visa numerical limits as established by Congress."[1] 75 FR 58962. USCIS does not have the authority to force DOS action. A decision to base visa availability on workload is "contrary to law" and an abuse of discretion. 5 U. S. C. §706. To the extent that DOS and USCIS reinterpreted visa

[1] As previously discussed in the subdelegation section, DOS and USCIS's statements that USCIS had the authority to determine which visa numbers were immediately available were also contrary to law and arbitrary and capricious.

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availability and "immediately available" to include workload, that interpretation is arbitrary and capricious and did not "follow a logical and rational decisionmaking" process, *Allentown Mack*, 522 U.S. at 374 (internal quotation marks omitted), and changed their "definitive interpretation" to the law governing visa availability. *MBA*, 135 S. Ct. at 1205.

Additionally, DOS's impermissibly based the revised Dates for Filing on political pressure. Some Congressional and Administration officials opposed the original Dates for Filing based on their opposition to immigration generally as well as the specific effects on jobs for U.S. citizens. Congressional officials' authority over immigration is limited to changing immigration law. As the law did not change, DOS's revision of the Visa Bulletin based, in part, on political pressure wasan "abuse of discretion" and "contrary to law."

DOS must calculate the availability of visa numbers based on information from its own employees, USCIS, and the waitlist. The Complaint has plausibly pleaded that DOS based the revised Dates for Filing on impermissible factors, an abuse of discretion and contrary to law.

b) USCIS's actions related to interpreting and applying of "immediately available" violate the APA

To the extent that USCIS has attempted to usurp DOS's authority to determine whether a visa is "immediately available," that action is contrary to law. Beginning with the original October 2015 Visa Bulletin, USCIS has publicly taken the position that it is the final arbiter of the immediate availability of a visa number. USCIS's regulations are quite clear that USCIS lacks this authority and must abide by the information in the DOS Visa Bulletin. They state:

> An alien is ineligible for the benefits of section 245 of the Act unless an immigrant visa is immediately available to him or her at the time the application is filed. If the applicant is a preference alien, the current Department of State Bureau of Consular Affairs Visa Bulletin will be consulted to determine whether an immigrant visa is immediately available. A preference immigrant visa is considered available for accepting and processing if the applicant has a priority date on the waiting list which is earlier than the date shown in the Bulletin (or the Bulletin shows that numbers for visa applicants in his or her category are current).

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8 C.F.R. 245.1(g)(1). The Board of Immigration Appeals has stated this regulations means: "A visa is immediately available when an alien's priority date is earlier than the date for the specified preference category shown in the current Visa Bulletin." *Zamora-Molina*, 25 I. & N. Dec. at 609.

Where an agency's action is inconsistent with the regulation it is interpreting or applying, that action is arbitrary and capricious in violation of 5 U. S. C. §706. *MBA*, 135 S. Ct. at 1205. Moreover, an agency cannot change its "definitive interpretation" of a regulation without notice and comment, even when it has some discretion. *Id*.

Here, USCIS conduct has attempted to avoid its own regulations and has effectively amended them. This is contrary to the law. Its interpretation is impermissible under the APA.

c) DOS provided no reasonable justification for the revision

First, the Revised Visa Bulletin did not explain the revision. It simply stated that the revised dates "*better* reflect a timeframe justifying immediate action." In effect, the original Dates for Filing were a reasonable calculation, but these are better. The APA requires that the Defendants provide more substantial justification given the substantial change in the dates for filing and the reliance interests at issue. Their failure to do so was arbitrary and capricious. *Id*.

Second, Defendants have not provided any explanation sufficient to justify revising the dates when balanced with the harm of the revision. Defendants have provided no evidence of an alleged miscalculation. An agency's unsupported declaration of the reasoning on which it action is based is insufficient to justification. *State Farm*, 463 U.S. at 46–56. The agency must "adduce empirical data that can readily be obtained." *Fox TV U.S.S.C.*, 556 U.S. at 519 (Kennedy, J, concurring). DOS and USCIS possess the relevant information and data but have released nothing. Their position is, in effect, "trust us." The APA demands more.

The subsequently-released Visa Bulletins support the fact that no miscalculation occurred. According to Defendants, the Dates for Filing are based on visa availability in an 8 to

12 month window. Yet, the present Final Action Date for China EB-2 visas is just five months shy of the Original October Visa Bulletin date for filing a China EB-2 visa and is projected to equal it by next month. The inaccuracy of the revised Dates for Filing further substantiates Plaintiffs' contention that the revised Dates for Filing were incorrect at the time of the revision.

Third, subsequent Visa Bulletins further substantiate that the Dates for Filing revisions were capricious and not based on the projected Final Action Dates 8 to 12 months in the future. The Dates for Filing have not changed in any of the retrogressed categories in six months and the Final Action Dates will soon be equal to the Dates for Filing in some categories.[2] The complete lack of movement in the Dates for Filing also shows that no miscalculation occurred. Further, Defendants failed to issue 6,000 employment visas last year, which modernization was supposed to help. https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2015 AnnualReport/FY15AnnualReport-TableV.pdf (last visited Mar. 8, 2016). The Original Visa Bulletin would have helped.

Defendants have not justified the revisions to the extent required under the APA nor substantiated their alleged miscalculation. They have to "examine the relevant data and articulate a satisfactory explanation for its action." *State Farm,* 463 U.S. at 43. Moreover, the revised Dated for Filing "rest upon factual findings that contradict those which underlay" the original Dates for Filing, unsettling substantial reliance interests. *Fox TV U.S.S.C.*, 556 U. S., at 515. Failure to do so was arbitrary and capricious. *MBA*, 135 S. Ct. at 1209.

[2] For example, according to the Defendant's position, at the time of the issuance of the Revised Visa Bulletin, the estimated final action date—i.e. the Date for Filing— for China EB-2 visas on October 1, 2016 (12 months after the October 2015 Visa Bulletin) was January 1, 2013. At present the estimated final action date for China EB-2 visas in March 1, 2017 (12 months after the March 2016 Visa Bulletin) remains January 1, 2013. The filing date for China EB-2 visas in the March 2016 Visa Bulletin is August 1, 2012. Given that USCIS has few applications in queue for priority dates after January 1, 2013, it is implausible for Defendants to contend that January 1, 2013 date for filing for China EB-2 visas represent an estimation of the Final Action Dates one year from now.

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iv. Defendants' Wait List Claims Were Sufficiently Plead

The Complaint discusses DOS's obligation to maintain waitlists and to consider the waitlist as a factor when calculating visa availability, as required by 8 U.S.C. §1153(e)(3); 22 C.F.R. §42.51(a),(b), among others. Plaintiffs allege that DOS has failed to maintain the required waitlist and to consider the waitlist in the visa availability calculation here.

Zixiang Li v. Kerry, demonstrates that DOS's waitlist failure is reviewable. 710 F.3d 995, 1001 (9th Cir. 2013). The Ninth Circuit affirmed the dismissal of a claim because it was based on vague standards and actions not required by law. 710 F.3d at 1001. In contrast, DOS *is* required by law to maintain the waitlist and use that information to determine visa availability.

In contrast, Defendants' challenge allegations that individuals were improperly ordered on the waitlists arguments. However, Plaintiffs have not made this allegation. That was a part of the plaintiffs' argument in *Zixiang Li*. 710 F.3d 995. Further, Defendants' discussion of *Zixiang Li*, is somewhat inaccurate. In *Zixiang Li*, the Ninth Circuit *did not* consider claims regarding the waitlist because the plaintiffs had failed to plead them in the complaint. 710 F.3d 1001. Defendants' contention that the wait list claims "fail under binding circuit precedent," citing *Zixiang Li*, 710 F.3d 1001, misrepresents the case.

The waitlist claims were properly pleaded, alleged sufficient facts, and alleged a statutory basis for the duty to maintain a waitlist. Therefore, the waitlist claims survive.

D. Plaintiffs' Liberty and Property Interests Are Sufficient To Be a Violation of Their Due Process Rights

The Fifth Amendment ensures due process for all. Procedural due process constrains agency actions which deprive individuals of liberty or property interests protected by due process. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). A property interest is protected when a person has "reasonable expectation of entitlement deriving from existing rules or understandings that stem from an independent source such as state law." *Wedges/Ledges of California, Inc. v. City of Phoenix, Ariz.*, 24 F.3d 56, 62 (9th Cir. 1994) (internal quotation marks omitted).

The Supreme Court has long held that an agency's regulations and internal rules and processes can create due process procedural rights, *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 98 L. Ed. 681, 74 S. Ct. 499 (1954), and the process for depriving a person of those rights must satisfy due process. *See, e.g., Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 431-33 (1982). Additionally, judicial review is available if the agency's non-compliance causes substantial prejudice. *Amer. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532 (1970).

Plaintiffs allege, in part, that the property interests in this case are those benefits for *applicants* for adjustment, including Employment Authorization Documents which grant employment flexibility, as well as advance parole for travel. These benefits are real and substantial. Individuals in the U.S. employed on H-1B visas are effectively trapped. They do not get promotions that similarly-placed co-workers get and their livelihood is constantly at risk. Many live in fear that they could be waiting for a green card for a decade at risk of losing everything and being exiled if they are laid off from their job. Travel to visit family is difficult if not impossible. These individuals wait for years for the opportunity to apply for adjustment of status and to get on the path to U.S. citizenship.

Plaintiffs relied on the Original Visa Bulletin as millions of people have over the years. They spent thousands of dollars in the 16 days between September 9, 2015 and September 25, 2015. They cancelled trips, took days off work, and made major life decisions[3] in reliance on the dates in the Original Visa Bulletin. All of this after years of sacrificing work and life choices and

[3] In at least two cases of which we've become aware, women found out they were pregnant after they got vaccinations required to file an adjustment application and were advised that their babies risk serious birth defects as a result. In one case, the pregnant mother aborted the fetus upon the advice of her physician.

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of obsessively tracking the Visa Bulletin releases. This shows the meaningful and substantial immediate and long-term benefits of getting the earliest adjustment of status possible.

Courts have repeatedly found due process violations based on expectation or reliance interests. A path can be traced from *Accardi* to *American Farm Lines* to *Perry* and *Roth* and on. "'Property' interests subject to procedural due process protection are not limited by a few rigid, technical forms." *Perry v. Sinderman*, 408 U.S. 593, 601 (1972); *see also Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Of note, in *Perry*, the Supreme Court based the property interest not on a formal contract but on de facto understanding. 408 U.S. 593.

The right to *apply* for discretionary relief based on legally-mandated calculation of eligibility can give rise to a property interest. Consider *United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1049-50 (9th Cir. 2004), where the court found that an Immigration Judge's failure to advise noncitizen of right to apply for discretionary relief was denial of due process. Here, Defendants impermissibly denied Plaintiffs the right to apply for discretionary relief.

This Response will address in turn Defendants' four short arguments as to why the facts do not support Plaintiffs' due process claims. Before proceeding, Plaintiffs highlight one common problem with Defendants' challenge: Defendants' base their factual arguments on their own version of the facts wherein the Original Visa Bulletin was severely miscalculated and Defendants followed all applicable statutory and regulatory rules in making the revision. This version of the facts is irrelevant in a motion to dismiss. The Plaintiffs' plausibly allege based on pleaded facts that the Original Visa Bulletin contained the proper calculations establishing that a visa was immediately available and that the Revised Visa Bulletin did not. To paraphrase Defendants, the INA "specifically [grants] Plaintiffs eligibility for adjustment of status [when] a visa is "immediately available" to the applicant at the time the adjustment of status application is filed, 8 U.S.C. §1255(a)(3)."

i. The first Dates for Filing Chart

Defendants assert that "from a historical perspective" Plaintiffs could not rely on Defendants' years-long practice regarding the release and effect of the Visa Bulletin because the Visa Bulletin had not previously included a Dates for Filing Chart. Realistically, however, there was no reason for Plaintiffs to alter their expectations regarding the Visa Bulletin simply because it included additional information. Defendants' contemporaneous publications and public statements were all consistent with prior practice and evinced no implication of a change to the reliability of the Visa Bulletin. Moreover, Defendants' argument opposes common sense. Just as businesses would immediately rely upon an additional documentation requirement in government bidding rules, individuals immediately relied upon the additions to the Visa Bulletin.

ii. Plaintiffs' reliance was not unilateral expectation

Defendants state that "Prior to September 9, 2015, Plaintiffs had no reasonable expectation that they would be able to file their adjustment of status applications in the foreseeable future." Implicit in that statement is that starting on September 9, 2015, Plaintiffs *did* have a reasonable expectation that they would be able to file their adjustment of status applications on October 1.

Plaintiffs plausibly allege that a visa number was immediately available on October 1, 2015, that the original Dates for Filing were correct under the law, and that the revisions did not reflect visa availability. Moreover, by creating a reasonable expectation that they would be able to file on October 1, 2015, Defendants created a protected interest in the benefits which would have been available. Defendants deprived Plaintiffs of that interest with no process at all.

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iii. Property and liberty interests need not derive from statutory requirement

The Supreme Court and dozens of other courts have determined that liberty or property interests were at issue before the benefit at issue would be available and where the interests involved intangible benefits. *See*, *e.g.*, *Logan v. Zimmerman Brush Co*., 102 S.Ct. 1148, 1155 (1982) (right to pursue employment discrimination claim); *Barry v. Barchi*, 443 U.S. 55 (1979) (horse trainer's license); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978) (termination of utility services); *Mathews v. Eldridge*, 424 U.S. 319 (1976) (disability benefits); *Goss v. Lopez*, 419 U.S. 565 (1975) (high school education); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (welfare benefits). Further, protected interests need not be based on a statute or regulation, *Perry v. Sinderman*, 408 U.S. at 601, and protected interests extend "well beyond actual ownership of real estate, chattels, or money," *Board of Regents v. Roth*, 408 U.S. at 572.

Moreover, Defendants benefit substantially from the early issuance and they are not known for the courtesy and deference shown to potential applicants. It takes most applicants more than one month to complete their application packet. Thus, Defendants need to publish the Visa Bulletin before the first of the month in order to actually receive an anticipated number of applications before the next Visa Bulletin comes into force.

iv. Additional process was required

Plaintiffs contend that Defendants failed to follow due process and deprived Plaintiffs of their property and liberty interests. The due process required was timely public notice that some of the Visa Bulletin dates may necessitate revision. Then, before issuing a revision, Defendants were required to review the estimations of future visa availability based on the required data and information. If DOS determined that the visa availability dates in the Visa Bulletin did not accurately reflect projected visa availability, then DOS should have explained how it came to this conclusion. Defendants have done none of this.

The Complaint plausibly claims based on the alleged facts that Defendants were considering revisions as early as September 14, 2015. Defendants knew that individuals such as Plaintiffs were relying on the Visa Bulletin. With little to no burden, Defendants could have issued notice that a revision was under consideration and eliminated many of the costs and harms suffered as a result of Plaintiffs reasonable expectations. $3,000 wasted is a lot of money to lose.

Where property and liberty interests will be injured, an agency must do more than declare its own conduct proper with no substantiation. It must actually provide some reasoning and evidence to demonstrate that the injury was justified. Defendants have not done so.

Lastly, Plaintiffs do not demand that Defendants violate their statutes and regulations, but simply request that Defendants apply them lawfully under the APA and the Constitution.

E. The Court has authority to order the reinstatement of the Original Visa Bulletin, but monetary relief is impermissible

Under the Plaintiffs's facts, the court has the authority to order reinstatement of the Original Visa Bulletin. In *Norton v. South Utah Wilderness Alliance*, 542 U.S. 55, 61 (2004), the Supreme Court held that the APA authorizes suit by "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." The Supreme Court found that a plaintiff states a claim for relief under Section 706(1) when he or she "asserts that an agency failed to take a discrete agency action that it is required to take." Here, Plaintiffs allege that DOS was required to follow the Original Visa Bulletin because it was based on properly calculated visa availability and that the Revised Visa Bulleting was not. Further, USCIS was required to accept adjustment applications based on the Original Visa Bulletin. When an agency fails to act, the APA provides relief in the form of empowering a court to compel agency action unlawfully withheld or unreasonably delayed. Plaintiffs allege that agency action in the form of accepting adjustment applications was

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unlawfully withheld. Therefore, reinstatement should not be struck as a form of relief. Defendants' arguments are based on its own version of the facts and are therefore not relevant in this motion to dismiss.

Plaintiffs admit that compensatory monetary relief is not available for these APA claims.

IV. CONCLUSION

For the foregoing reasons, the Defendants' narrow reading of APA jurisdiction and insistence on appealing to its own version of the facts should be rejected. In conclusion, Plaintiffs adequately pleaded that Defendants' actions in failing to provide notice or sufficient explanation of the revisions, basing the revisions on legally-impermissible factors, depriving Plaintiffs of property and liberty rights, among their other improper conduct, established the jurisdictional, factual, and legal basis for this case. Accordingly, Plaintiffs respectfully request that the Court deny defendants' Motion to Dismiss.

//

Dated: March 7, 2016

Respectfully submitted,

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